No. 3813.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,
Plaintiff in Error,

vs.

ISADORE GOLDSTEIN,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

HENRY RODEN,
Attorney for Defendant in Error.

THE RECORDER COMPANY, 660 STEVENSON ST., S. F.

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ARGUMENT.

Plaintiff in error in its brief, page 10, admits that sufficient testimony was introduced upon the trial to justify the lower court in submitting to the jury the question as to whether or not water escaped from the penstock prior to the happening of the slide. A large volume of testimony was submitted upon this point, not only by plaintiff below, but also by defendant below. Its witness Higgins (p. 885 *et seq.*) testifies that he saw a stream of water coming from the spout shortly before the slide and that he hurried to a near-by telephone to inform the man in charge to investigate. Its witness Wert Newman (p. 831) testifies

that shortly before the slide he saw a stream of water ("of the same size as my leg") escape from the trommel spout. In addition to this there was the testimony of many witnesses who testified to seeing water escape from the trommel early in the morning. The witness Hyle saw a stream of water escape from the penstock an hour or so before the slide. (Tr., p. 127.) The witness Maynard saw a stream of water escape from the flume at half past nine in the morning of the day of the slide. (Tr., p. 132.) The witness Benson saw a stream of water escape from the end of the flume. (Tr., p. 322.)

See evidence Bussey (Rec. p. 158); also Newman (p. 170); also Johnson (p. 182).

It will hardly be claimed that there was no substantial testimony upon the point under consideration. The particulars of negligence complained of are as follows: "by constructing and maintaining a flume or conduit to confine and carry away to some safe place any water which at any time for any reason might be conveyed to the penstock in excess of what the distribution pipe would, could or did carry away, no water carried to the penstock could or would have overflowed or been deposited upon the slope or premises in question." Plaintiff below further claimed "that ordinary and reasonable care and caution on the part of defendant required that it should have constructed and maintained at all times such waste flume to carry away such water or surplus water and that defendant was negligent in not providing such protection against injury from surplus or overflowing water at or near the penstock."

We have heretofore shown the existence of ample evidence to sustain a finding that water overflowed and escaped from the penstock through and over the trommel screen spout. There was ample evidence to the effect that ordinary precautions on the part of defendant below should have caused it to install a flume or conduit to carry off any water that could not be taken care of by the service pipes.

See evidence of Dudley (Rec. pp. 80 and 84; Robe (p. 428).

The witness H. P. Crowther testified:

> "Q. State whether or not ordinary careful engineering of handling this water would require the installation of such a box? (To carry to a safe place any overflow water from the penstock.)
> "A. In my opinion it would." (See Rec., p. 143.)

The question as to negligence was fully and fairly submitted to the jury by the trial court. The jury was instructed that it was incumbent upon plaintiff below to sustain at least one of its enumerated acts of negligence on the part of defendant below. Upon this point the court submitted special questions to the jury, which questions and answers thereto were as follows:

> "Q. Was the defendant negligent in any of the particulars set forth in the complaint?
> "A. Yes.
> "Q. If so, in what did that negligence consist?
> "A. Failure to provide waste flume to carry overflow water from penstock and trommel screen to place of safety." (Pr. Tr., p. 1014.)

It is clear then, that there was ample evidence to support the contention that water came from the penstock and found its way down the hillside and that ordinary careful mining would have required the installation of a flume to take care of any water escaping from the penstock. Plaintiff in error says the water did not escape from the penstock but from the trommel screen. But it also states in its brief (p. 16) that this revolving screen was "in the penstock."

Plaintiff in error further claims that "if any water from its works reached the slide area, this was not due to its negligence, but to independent intervening causes." In other words, the slide was not caused by the negligent act of defendant below, but by the clogging up of the screen caused by an accumulation of rubbish carried to it by reason of a slide which occurred along the upper end of the flume line.

The question as to the proximate cause of the slide was fully and correctly submitted to the jury by the trial court.

Defendant below offered no instruction upon this point and made no objection to the instruction given.

We believe we have shown that the first contention of plaintiff in error, that there was no evidence of the negligent acts complained of and that it was conclusively shown that the slide was caused by independent intervening causes, is not sustained by the evidence.

The second ground presented by plaintiff in error for a reversal of this case is based upon the claim that there was no evidence of injury to the property de-

scribed in the complaint and no evidence of the value of the injured articles.

The first item of damage concerns the store building and is for $1500.

Upon this item plaintiff below testified that he based his estimate upon the cost of restoring the building to its original condition. That the repairs made necessary by the negligent acts of defendant below, immediately after the damage had been inflicted, would cost the amount mentioned. This was his best judgment, based upon his experience and the result of investigation made by him of persons qualified to speak upon the subject.

At the time this evidence was introduced defendant below offered no objection of any kind. It freely entered upon cross-examination. If it desired further light upon the subject under consideration it was there to be had. Defendant below could easily have ascertained all the details which plaintiff below considered in making up his estimate of damages.

> "The measure of damages to property is the cost of restoration when that can be done at reasonable expense."
>
> *Watson* vs. *Mississippi Power Co.*, 156 N. W. 188.

> "The damage sought being for the injury to the house, and not to the land, the jury should have been instructed that the proper measure of damages was the amount necessary to restore the building to its condition before the injury was inflicted."
>
> *Empire Mills Co.* vs. *Neering et al.*, 89 S. E. 530.

The second item covers damage done to the stock of merchandise by water and mud. The plaintiff testified that he had been engaged in the mercantile business for a number of years. That the stock damaged was in his store and warehouse; that it was damaged by water and mud and that some of it was entirely lost. (Tr., p. 207.) The witness further testified that his estimate was based upon the price "goods were worth at that time." (Tr., p. 207.) He also testified as to what these goods consisted of, namely, "boots, groceries, shoes and clothing of the value of $1500 in the store building and rice, bacon, hams, flour and beans in the warehouse, worth $1000. (Tr., p. 209.)

The testimony shows that the slide came without warning. That plaintiff had barely time to escape from the invaded premises and thereafter gave his immediate attention to the rescue of several unfortunates who were buried in the debris. (Tr., p. 203 *et seq.*)

The plaintiff testified that the merchandise stored in his store and warehouse was destroyed and damaged; that he is unable to give a detailed list of every item lost and that his best judgment and estimate is all he can give under the circumstances. The honest and high regard for his oath which the plaintiff below displays in the giving of his testimony is now sought to be made the basis of his failure upon this point. The principle of law is to the effect that under circumstances such as are disclosed by the evidence in this cause, the tort feasor will be held liable for such

damages as his negligence has occasioned, and if the injured party cannot minutely detail every item of loss sustained by him, the court will in every instance permit him to give his best estimate and judgment upon the amount.

"The owner of a stock of goods may testify to their value in a single sum after evidence that he is the active manager of the business conducted with the stock; that he knows the value; that the goods were destroyed, and that he cannot give the items of the stock in detail."

Union Pac. R. Co. vs. *Lucas,* 136 Fed. 374.

"The trial court did not err in permitting plaintiff to state as best he could the amount and quality of the lumber in the cars that were burnt."

Coleman vs. *Retail Lumbermen's Assoc.,* 79 N. W. 588.

"Defendant objects that there was no competent proof of the value of the goods destroyed and therefore the verdict not sustained by evidence. This objection, it seems to us, goes to the weight of the testimony rather than to its competency. Plaintiff testified to the value of the goods. He had purchased the same, they were in his personal charge, he had been selling from the stock and was undoubtedly competent to speak of the value of any particular article. In proving the value of personal property it is usually held that the owner is allowed to estimate its value whether he is qualified as an expert or not. 1 Wigmore, p. 716. Witness testified that he was familiar with the value the different kinds of goods; that it was part of his business to estimate and value stock on hand and that the leather and rubber goods on hand was not less than three thousand dollars and the whole stock not less than eight thousand dollars. We are of opinion that where no more accurate evidence is obtainable under

> the circumstances, the owner of such stock may give his opinion as to such value, to otherwise hold would result in a denial of justice in many cases. The law does not require mathematical certainty, but merely the best obtainable under the conditions existing and some reliance must be placed upon the integrity and good faith of the witness and the discretion of the jury."
>
> *Jensen* vs. *Palatine Ins. Co.*, 116 N. W. 286.

Unless some other basis is shown to exist upon which a witness bases his estimate as to values, it will be presumed that the estimate is based upon the market value at the time such estimate is made.

> "The witness testified that the killed and injured horses were of such and such a value. We think this fairly implies the market value at the time. The witness fixed no other basis of knowledge and when one speaks generally of the value of chattels it means their value in the market. This is inferred unless a different basis of value is fixed by the witness."
>
> *Coyle* vs. *Brown*, 41 Pac. 389.

In the case at bar the plaintiff below testified that the goods and merchandise destroyed and lost was fixed at the "price goods were worth at that time." (Tr., p. 207.)

Surely this estimate was based upon the market price of the articles at the place and time where and when they were destroyed.

The third item covers the damage done to plaintiff's warehouse. He testifies that this warehouse was totally destroyed and that the cost of replacement is $1400.

In *Kennedy* vs. *Treleaven,* 175 Pac. 977, the court say:

> "There is no universal test for determining the value of property destroyed or injured and the mode and amount of proof must be adapted to the facts of each case. (Quoting Sutherland on Damages, 3d ed., 1015.) *The cost of replacing* the building, making perhaps reduction for depreciation, is a better measure of what the property was fairly and reasonably worth at the time it was destroyed. One method of arriving at such loss is by estimating the cost of replacing the building, and the other is by evidence of the value of the building at the time of its destruction, less the value, if any, of the ruins."
>
> "The value of the property destroyed or the cost of restoring or replacing it is the proper measure of damages for the destruction of buildings which may at once be replaced." 8 R. C. L. 485.

The fourth item of damage concerns the destruction of the apartment house. The testimony shows that the building was totally destroyed by the slide. That it had cost the defendant in error eight thousand dollars and that eight thousand five hundred was the cost of its reconstruction. The building was comparatively new and had been used for rental purposes.

The fifth and last item concerns the value of the fixtures and furniture in the apartment house. The plaintiff gave an itemized list of the articles, together with their value, and testified that the articles were worth the respective amounts at the time of their destruction. (Tr., pp. 209-214.)

These cover the various items of damage to the allowance of which plaintiff in error objects.

We have already submitted a number of authorities to show that the trial court was correct in its ruling upon the motion for a new trial when the same points were raised. Upon this motion the lower court directed a reduction of the verdict in the sum of $4500 because plaintiff had failed to submit satisfactory evidence upon two items set up in the complaint totalling this amount. Upon the remaining items the trial court found that sufficient evidence had been submitted to sustain the findings of the jury.

An examination of the authorities will disclose the correctness of the ruling of the trial court.

> "Ordinarily the measure of damages for destroying buildings is what it costs to replace them."
>
> *Silva* vs. *City Council,* 148 Pac. 150.
>
> "The measure of damages to property is the cost of restoration when that can be done at reasonable expense and not the diminution in value of the property."
>
> *Watson* vs. *Mississippi Power Co.,* 156 N. W. 188.

In

> *Chicago & E. R. Co.* vs. *Ohio City Lumber Co.,* 214 Fed. 751,

a case very much like the case at bar, the witness had been asked "what, in your opinion, is the fair and reasonable value of each of the buildings destroyed just prior to the fire (by which they were destroyed)?"

The witness also placed lump sum values upon the lumber, glass, hardware and tools destroyed.

Objection was made because, 1st: the witness was not qualified to testify as to the value; 2d: because values were stated in gross sums and not in detail; 3d: because the true measure of the value of the buildings was their "fair market value" and not "their fair and reasonable value."

Said the United States Circuit Court of Appeals (8th Cir.) upon the objections raised:

> "These contentions are without merit. The witness lived in the dwelling house and used the other buildings which were burned and knew their age, location, use and condition. He was acquainted with the value of building material. With such knowledge and experience he was well qualified to testify on the subject of values. * * * Where more accurate knowledge is not available or obtainable any person, whether owner, active manager or employe who is familiar with the property or goods connected with and used in a business, although not an expert, may testify as to the value of such property when destroyed, or his estimates of value may be given in single or gross amounts."

In the case at bar the plaintiff below was well acquainted with the property destroyed. He was the owner thereof, had built the same and had managed them for a number of years. He testified as to their fair and reasonable value at the time of their destruction. He knew what their construction had cost and he further testified that he had consulted a number of builders and had obtained from them such information concerning cost of construction and material as would enable him to give an estimate as to what the cost of replacement would be. All this testimony was

submitted to enable the jury to determine as to the fair value of the property at the time of their destruction.

In *Walker* vs. *Collins,* 50 Federal, witnesses testified that they knew the character of the goods taken and had been selling the same and that they thought they knew the "fair value." Held not error.

In the case at bar the witness testified that he had been conducting a mercantile business upon the premises, and he gives the market value of the merchandise lost at the time of the accident. Being a merchant, as the testimony discloses, it is fair to conclude that he was acquainted with all the items that go to make up such value.

> "No hard and fast rule can be laid down as to the measure of loss suffered by the destruction of buildings. In some instances it may be their value detached from the land and separated from the use made of them; in others, *where an active market is shown* to exist, the market value may be the fair measure of loss. In still others, the cost of reconstruction, after deducting depreciation from age and other causes, may fairly recompense the owner. *Usually, however, the real or ordinary value, based upon and determined from its cost, age, condition, location and the use to which it has been put, furnishes a fair measure of the loss occasioned by its destruction.* In this case, it appears the buildings were located in a small village and had little, if any, market value. No error was committed in permitting the witness to testify as to the fair and reasonable value of these buildings, taking into consideration their age, condition, depreciation, and cost of reconstruction and their use."
>
> *Chicago & E. R. Co.* vs. *Ohio City L. Co.,* 214 Fed. 751.

In the case at bar the plaintiff below testified as to the location of the buildings, the use made of them, their age, their cost of construction and the estimated cost of reconstruction. They were located in a community where "no active market in real estate was shown to exist," and the jury, in returning a verdict for over three thousand dollars less than plaintiff claimed to have been his loss on account of defendant's negligence, must have made some allowance for depreciation, in spite of the fact that the testimony shows the $8000 apartment house to have been a new building. But if these values were swollen or false, the plaintiff in error did not attempt to show it. It was apparently well pleased with the estimates submitted by defendant in error.

Says the Supreme Court of Missouri in *Seyfarth* vs. *Railway Co.,* 52 Mo. 450, involving the testimony of husband and wife as to the value of goods of a kindred character as in the case at bar:

> "the subject of inquiry was not one to which the doctrine in reference to experts applied; and it cannot be questioned that the opinion of this witness as to the value of the articles was clearly admissible under the circumstances. The plaintiff was not obliged to restrict the examination to the value of each article, and in that way arrive at the total value; nor was it incumbent on him to show the process by which the conclusion of the witness was reached."
>
> "We think it was competent for the witness (the owner of the goods) to state the value of the stock in the store. Such evidence was not the statement of a conclusion, but of a fact. If the defendant

desired, he could, on cross-examination, have interrogated the witness as to the value of the different articles and kind of goods."

Western Home Insurance Co. vs. *Richardson,* 58 N. W. 600.

To the same effect are the following:

Erickson vs. *Drazkowski,* 54 N. W. 283, (Mich.);
Tubbs vs. *Garrison,* 25 N. W. 923 (Iowa);
Railway Co. vs. *Miller,* 162 S. W. 76;
P. & N. T. Ry. Co. vs. *Porter,* 156 S. W. 267;
Fairfax vs. *Railway,* 73 N. Y. 167, 29 Am. Rep. 119.

"The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony may be left to the jury; and courts have usually made no objections to this policy."

Wigmore, vol. 1, par. 716.

In the case of *Pecos & N. T. Ry. Co.,* 171 S. W. 318, one of the owners of a part of the property testified as to the worth and value of a part of the personal property consisting of clothing, culinary articles, household paraphernalia, etc., stating the same item by item. Defendant objected to the witness, "stating what said items were worth, because this was not the proper method of proving the value of said articles, or the proper measure of damages for the loss thereof."

Says the court, after quoting numerous authorities:

"We are unable to find any well considered case, as to the peculiar property involved here,

> that the owner of the goods, as a witness, is required to state the elements mentioned (cost of articles, period of their use and their condition at time of destruction) as a precedent qualification to testify to their value. The defendant produced no witness testifying to the value of the property lost; neither does the record show any cross-examination by defendants of the witnesses attempting to ascertain the cost of said articles, the extent of their use, the kind and character of the same, or as to the condition of the goods at any time, but rely solely upon the general objection. If the value in this instance is at all fanciful, or if the ingredients of cost, the extent of the use of the property, the condition of same at the time of their loss would have indicated to the jury that the value placed upon the same was improper, we believe, in this character of case, it is the duty of defendant to elicit it."

An examination of the authorities submitted by plaintiff in error do not sustain its contention.

In *Illinois Central R. Co.* vs. *Elliot,* 82 S. 585, complaint is made about the charge of the court upon the measure of damages. In the case at bar the instruction given was apparently satisfactory to plaintiff in error for no objection was offered and no proposed instruction tendered upon this point.

Counsel quote from *Byrne* vs. *Combria Co. Ry. Co.,* 68 Atl. 672. They forget to quote that the evidence complained of was given over the objections of the defendant. An examination of the record in the case at bar fails to disclose the interposition of a single objection against the admission of the evidence now complained of.

Counsel quote at length from the decision in

Watson et al. vs. *Loughram*, 38 S. E. 82.

An examination of this case discloses that counsel fail to quote the important part of the decision. The case was reversed upon an erroneous instruction concerning the measure of damages. We quote from the decision:

> "The only evidence as to the value of some of the jewels was the price at which they had been purchased and some of the most valuable of them had been purchased many years prior to the loss. In arriving at their verdict the jury was clearly controlled by the price paid and not by their market value at the time when the loss occurred, and although the evidence of the plaintiff showed that the market value of a pair of bracelets at the time of the loss was ten per cent less than the price paid for them, the jury evidently estimated them at their purchase price. (Verdict being for the exact amount set up in the petition.) In view of this, it was error to charge the jury as follows:
>
> " 'This is a question of the value of property, and you are to be governed by the value of that property as produced upon the stand; whether right or wrong is no concern of yours—you find your verdict according to what is proven to be the value of the property.' "

Upon this instruction the Appellate Court remarks:

> "As we have seen with reference to some of the jewels lost the only value produced upon the stand was the valuation put upon them by the buyer and seller at the time of their purchase, and the jury, from the charge that they were 'to be governed by the value of that property as produced upon the stand' which, 'whether right

> or wrong, was no concern of theirs' might have understood that they were compelled to find the value of these jewels in accordance with that valuation."

A very different situation from the case at bar, where the Court instructed correctly upon the measure of damages and to the satisfaction of plaintiff in error.

In *Schwartz* vs. *Schendel,* 53 N. Y. S. 829, the only evidence introduced was to the effect that some damage had been done to certain goods by water overflowing and that the value of the goods damaged, at a rough estimate, was $200. There was no testimony as to the nature and quantity of the goods nor as to the extent of the injuries thereto.

In *Glass* vs. *Hauser,* 78 N. Y. S. 830, the court says:

> "In one breath plaintiff testified to $380.24, in the next to $365.05, and in the next to $363.05 as to the value of the property, upon which the justice gave a judgment in the sum of $263.05."

In *Lee* vs. *Callahan,* 84 N. Y. S. 167, the plaintiff stated what he paid for the injured horse a year and a half before the accident, and that he did not know its market value.

In *Whitmark* vs. *Lorton,* 8 N. Y. S. 167, plaintiff testified what he had paid or agreed to pay for the property converted, and the court held that this testimony furnished no basis for the amount of damage he might be entitled to.

In *Brooks* vs. *Cunard S. S. Co.,* 93 N. Y. S. 369, an action brought for the loss of baggage, the testimony of plaintiff was that he based his opinion of the

value of the goods lost on their cost price, unaccompanied by further testimony as to their cost price, except in the case of a very few articles.

Counsel quote from

> *Carmen* vs. *Montana Cent. Ry. Co.*, 79 Pac. 690.

From the quotation of plaintiff in error one might conclude that the case was reversed on account of lack of evidence to support the finding as to the amount of damages. Such is not the case. The Appellate Court found no evidence to sustain the allegations of the complaint as to the negligent conduct of the defendant railway company, on account of which the cattle were claimed to have been killed and injured. As to the testimony to support the amount of damage done, it clearly appears that the value of the killed animals and the value of the injured ones were lumped in the sum of $240. The evidence is:

> "Q. What would you place the value of those animals—taking all those that were *injured or killed,* what would you place the damage at—the value?
>
> "A. I would not have sold them for near the amount of money I put them in for.
>
> "Q. Tell the jury what they were worth (the killed and injured animals).
>
> "A. They were worth to me more than they would be to most anyone—I put them in for $250."

We find no fault with the court when it says:

> "The damages for the cattle which were killed would have been their market value at the time of the killing, with interest thereon, but his damages, for the cattle injured, could not be fixed by the same rule."

Certainly the value of the injured cattle was not the amount of damages sustained by plaintiff in that case.

In *McGillivray* vs. *Hampton,* 179 Pac. 733, quoted by counsel for plaintiff in error, the court says:

> "As to the finding of the court that the hay destroyed had a market value of $8.00 per ton, we have searched the record in vain to find evidence to support it. None of the testimony placed the value of baled hay at a greater sum than $8.00 for baled hay; the cost of baling was proved to be $1.75 per ton. The price of $8.00 per ton for unbaled hay as fixed by the trial judge is not supported by a word of evidence."

The last case cited by plaintiff in error is *Hays* vs. *Windsor,* 62 Pac. 395, this being an action for replevin. Upon the question of damages, and upon which plaintiff in error seems to rely, the syllabus reads:

> "Evidence that defendant, in an action of replevin, had lost much time and had been deprived of the replevined goods, and had been delayed in the payment of his debts, is not sufficient to show the damage resulting from the wrongful suing out of the writ."

Counsel refer to the case of *Boland* vs. *Ballaine,* 266 Fed. 22, decided by this Honorable Court. This was an action for malicious prosecution. Plaintff gave evidence of the value of lots and blocks owned by him prior to the bringing of the suit and then contrasted these values with the values after the suit. Objected to because not the proper measure of damages in an action for malicious prosecution. Say the court:

> "Plaintiff is confined to the establishment of actual damages sustained, which must be shown by loss of particular sales that eventuated by reason of the clouding of his title. He is not permitted to show generally that his property depreciated in value between the time of the commencement of the suit and lapse of time for appeal."

In conclusion, we desire to call the attention of the court to the fact that the record in the case at bar fails to show that plaintiff in error at any time objected to the testimony given by defendant in error upon the amount of damages sustained by him. It entered freely upon a cross-examination and it is significant that it offered not a particle of testimony showing or tending to show that the several amounts testified to by defendant in error were merely speculative, false or fanciful.

> "The defendant offered no evidence as to the value of the property destroyed. If its counsel believed that the estimate of value given by plaintiff was incorrect or too high, it would not have been difficult for them to show the true and correct value of staple articles of merchandise; having made no effort to disprove or contradict plaintiff's proofs in that regard it is fair to assume that they had small confidence in their ability so to do."

Chicago & N. E. R. Co. vs. *Ohio City Lumber Co.*, 214 Fed. 751 (8th Circt.).

We respectfully suggest that the judgment of the lower court should be sustained.

Respectfully submitted,

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